482

117

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885

No. 190.

WALTON FERGUSON, PLAINTIFF IN ERROR,

vs.

CHESTER A. ARTHUR, LATE COLLECTOR OF THE PORT
OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

FILED FEBRUARY 16, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 190.

WALTON FERGUSON, PLAINTIFF IN ERROR,

vs

CHESTER A. ARTHUR, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate	2	1
Summons	4	2
Certiorari	6	2
Complaint	8	3
Bill of particulars	12	5
Plea	14	5
Trial	16	5
Postea	18	6
Bill of exceptions	20	7
Protest	21	7
Stamp	23	8
Circular	23	8
Stamp	25	9
Circular	25	9
Motion for verdict for defendant	34	12
Plaintiff's requests	34	12
Directions to jury	35	12
Verdict	35	12
Certificate to bill of exceptions	35	12
Assignment of errors	37	12
Joinder in error	40	13
Bond	42	13
Citation	44	15
Proof of service of citation	45	15

JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Walton Ferguson, plaintiff in error, and Chester A. Arthur, defendant, a manifest error hath happened, to the great damage of the said Walton Ferguson, plaintiff in error, as by his complaint appear, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-one, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 27th day of Sept., in the year of our Lord one thousand eight hundred and eighty-one.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOSEPH M. DEUEL, *Clerk.*

The foregoing writ is hereby allowed.

ADDISON BROWN.

2 [Endorsed:] 4842. U. S. Supreme Court. Walton Ferguson, plaintiff in error, against Chester A. Arthur, defendant in error. Writ of error. Geo. S. Sedgwick, att'y for pl'ff in error, 140 Nassau St., N. Y. Due service of copy of within hereby admitted. New York, Sept'r 27, 1881. S. L. Woodford, attorney for defendant in error. [Stamped:] U. S. circuit court. Filed Sep. 29, 1881. Joseph M. Deuel, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

3 I, Joseph M. Deuel, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from four to forty-five, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Walton Ferguson, plaintiff in error, against Chester A. Arthur, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this thirtieth day of September, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and sixth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOSEPH M. DEUEL, *Clerk.*

4 *Summons for a Money Demand on Contract. Com. not ser.*

N. Y. Supreme Court.

WALTON FERGUSON, doing business under the firm name of J. & S. Ferguson, Plaintiff,
against
CHESTER A. ARTHUR, Collector, &c., Defendant.

To the defendant above named:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the supreme court at New York city, and to serve a copy of your answer to the said complaint on the subscriber at his office, number 11 Pine St., New York city, within twenty days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will take judgment against you for the sum of
5 one thousand five hundred dollars, with interest from the 19th day of January, one thousand eight hundred and seventy-six, besides the costs and disbursements of this action.

Dated June 28th, 1876.

GEORGE S. SEDGWICK,
Plaintiff's Attorney.

"Endorsed:" To Chester A. Arthur, Esq., collector, &c.

6 The President of the United States of America to the judges of the supreme court of the city of New York, Greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause, commenced [L. S.] before you against Chester A. Arthur defendant, by Walton Ferguson, doing business under the firm name of J. & S. Ferguson, plaintiffs, do therefore command you, that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 4th day of September, 1876, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, Esquire, Chief Justice of the Supreme

Court of the United States, the 31st day of August, in the year one thousand eight hundred and seventy-six.

JOHN I. DAVENPORT, *Clerk.*
GEORGE BLISS,
Defendant's Attorney.

7 [Endorsed:] 4842. U.S. circuit court. Ferguson *vs.* Chester A. Arthur. Copy *certiorari.* George Bliss, defendant's attorney. Sir: Take notice that the within is a copy of a *certiorari* this day issued out of the circuit court of the United States for the southern district of New York. New York, Aug. 28, 1876. Yours, &c., George Bliss, defendant's attorney. Due service of a copy of the within, and of the above notice, is hereby admitted. New York, Aug. 31st, 1876. Geo. S. Sedgwick, plaintiff's attorney.

8 THE UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

Circuit Court of the United States for the Southern District of New York.

In the Second Circuit of the — Term, in the year one thousand eight hundred and seventy.

WALTER FERGUSON *et al. vs.* CHESTER A. ARTHUR, Collector, &c.

The plaintiffs in this suit come into court, and by George S. Sedgwick, their attorney, give the court now here to be informed that heretofore, to wit, on the 28th day of June, one thousand eight hundred and seventy-six, this action was commenced in the supreme court of the city of New York according to the laws of the State of New York, and the rules and practice of said court, in favor of the said plaintiffs against the defendant herein, upon the causes of action hereinafter set forth and the summons therein filed with the clerk of said court. That the defendant afterwards, by his attorney, George Bliss, Esquire, duly appeared in said action, and thereupon, on the 28th day of August, in the year one thousand eight hundred and seventy-six, the said action was duly removed by writ of *certiorari* for further prosecution in this court, according to the act of Congress in such case made and provided, and the clerk of the said court did thereupon return the said writ with the said summons,
and duly file the same in this court, which allegations the
9 defendant admits to be true.

Wherefore, let the further proceedings and trial in this action be continued in this court.

And the said plaintiffs, by their said attorney, complain of said defendant of a plea of trespass on the case for promise, for that whereas said defendant, on 19th day of January, eighteen hundred and seventy-six, at New York city, in the district aforesaid, was indebted to said plaintiffs in the sum of fifteen hundred and $\frac{\quad}{100}$ dollars, lawful money of the United States of America, for duties on merchandise, to wit: calcined magnesia, imported into and entered at the collection district of the United States for the city of New

York on or about January 19th, in the year one thousand eight hundred and seventy, in the following vessels, to wit: Java, from Liverpool, unlawfully demanded, exacted, and received at said New York city by the said defendant, then collector of the customs for said district, under color of a law of the United States for the collection of duties on imports, and paid by the said plaintiffs under protest and appeal in writing in due form of law.

And being so indebted he, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the
10 said plaintiffs the said sum of money when he, said defendant, should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, was indebted to the said plaintiffs in the further sum of fifteen hundred dollars, lawful money of the United States of America, for money before that time lent and advanced by said plaintiffs to said defendant, and at the special instance and request of the said defendant; and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the like request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiffs; and, being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this court mentioned when he should be thereunto afterwards requested.

Nevertheless, said defendant (although often afterwards requested so to do) has not paid said sums of money or any or either of them or any part thereof to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs has hitherto refused, and still does refuse, to the damage of the said plaintiffs of fifteen hundred dollars; and therefore the said plaintiffs bring suit, &c.

GEORGE S. SEDGWICK,
Attorney for the Plaintiffs.

11 [Endorsed:] 4842. U. S. circuit court. Walter Ferguson *et al. vs.* Chester A. Arthur, collector, &c. Declaration. To George Bliss, Esq., defendant's attorney. Sir: Please take notice that a rule has been entered in the book of common rules in the office of the clerk of this court, at the city of New York, requiring the defendant to plead to the declaration in twenty days after service of a copy thereof and notice of said rule on his attorney, or judgment, &c. New York, December, 1876. George S. Sedgwick, attorney for plaintiffs, 11 Pine street. Due service of a copy of within declaration and above notice is hereby admitted, this — day of December, 1876. ——— ———, defendant's attorney.

12 U. S. Circuit Court, Southern District of New York.

WALTON FERGUSON *et al.*, Plaintiff-,
vs.
CHESTER A. ARTHUR, Defendant.

Sir: Please take notice that within is plaintiffs' bill of particulars of his claim against the above-named defendant:

Names of importers—J. & S. Ferguson & Co.
Description—Calcined magnesia.
Place whence imp'd—L'pool.
Names of vessels—Java.
Date invoice—Dec. 29, 1875.
Date of entry—Jan'y 19, 1876.
Excess—695.44.
Paid—Jan'y 19.
Date protest—Feb'y 2.
Date appeal—M'ch 7.
Date Secretary decision—Ap'l 1st.

13 Endorsed: 4842 U. S. circuit court, southern district of New York. Walton Ferguson *et als.*, plaintiffs, *vs.* Chester A. Arthur, defendant. To Geo. Bliss, defendant's attorney; Geo. S. Sedgwick, plaintiffs' attorney.

14 *Plea.*

United States Circuit Court, Southern District of New York.

CHESTER A. ARTHUR
ads.
WALTON FERGUSON, firm J. & S. Ferguson.

And the said defendant, Chester A. Arthur, by George Bliss, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise in manner and point as the said plaintiff in this suit has above thereof declared against the said defendant, and of this he puts himself upon the country, and the said plaintiff does the like, &c.

GEORGE BLISS,
Defendant's Attorney.

To Geo. S. Sedgwick, Esq., plaintiff's attorney.

15 "Endorsed:" 4842. U. S. circuit court. Chester A. Arthur *ads.* Walton Ferguson, &c. Plea. George Bliss, att'y for defendant. You will please take notice that the plea of the defendant in the above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court for the southern district of New York. New York, Jan'y 23d, 1877. Yours, &c. George Bliss, defendant's attorney. To Geo. S. Sedgwick, Esq., plaintiff's attorney.

16 At a stated term of the circuit court of the United States of America for the southern district of New York, in the sec-

ond circuit, held at the United States court-rooms, in the city of New York, on Thursday, the thirteenth day of November, in the year of our Lord one thousand eight hundred and seventy-nine.

Present: The Honorable Nathaniel Shipman, judge.

WALTON FERGUSON, &c.,
vs. } 4842.
CHESTER A. ARTHUR.

On motion of S. G. Clarke, Esq., of counsel for the plaintiff in the above-entitled action, ordered — trial.

Jurors sworn.

George G. Nason, John F. Scott, William D. Wilson, Andrew Campbell, Franklin M. Ketcham, William B. Clerk, Geo. T. M. Davis, Eber P. Fish, Sidney P. Ingraham, John M. Watson, Lawson Valentine, Abraham Lert.

Mr. Clarke opens the case on the part of the plaintiff.

Evidence for the plaintiff.

Walton Ferguson sworn.
L. G. Bronda "
William Wilson "

17 Opening of the case on the part of the defendant waived by A. B. Herrick, ass't U. S. att'y of counsel for defendant.

Evidence for the defendant.

Daniel C. Robbins sworn.
John D. Dix "

A. B. Herrick, Esq., ass't U. S. att'y of counsel for the defendant, moves that the court direct the jury to find a verdict for the defendants, and is heard in support of said motion.

Mr. Clarke is heard in opposition thereto.

The court directs the jury to find a verdict for the defendant.

The jury say that by direction of the court they find a verdict for the defendant, and so say they all.

On motion of Mr. Clark — ordered that the plaintiff have thirty days within which to prepare and serve a bill of exceptions herein.

18 *Judgment.*

United States Circuit Court, Southern District of New York.

WALTON FERGUSON, &c., *vs.* CHESTER A. ARTHUR.

The issues in this action having been brought on for trial before Mr. Judge Shipman and a jury, at a circuit court of the October term, 1879, and the issues having been tried, and a verdict for the defendant having been duly rendered on the thirteenth day of November, 1879, and his costs having been adjusted at $51.91, now, on motion of Stewart L. Woodford, United States attorney for defendant, it is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $51.91, his taxed costs, and have execution therefor.

Judgment signed this 4th day of Oct., 1880.

J. M. DEUEL, *Clerk.*

19 [Endorsed:] 4842. United States circuit court. Walton Ferguson, &c., *vs.* C. A. Arthur. Judgment roll. Stewart L. Woodford, United States attorney for defendant. Filed ——, 187–. Costs, $51.91. U. S. circuit court. Filed Oct. 4th, 1880. Joseph M. Deuel, clerk.

20 U. S. Circuit Court, Southern District of New York.

WALTER FERGUSON
vs. } 4842.
CHESTER A. ARTHUR.

And afterwards the said action came on to be tried at a stated term of said court, before the Hon. Nathaniel Shipman, district judge, sitting as circuit judge, and a jury impanelled therein, on the 13th day of November, 1879, the respective parties being represented by their counsel; and in the course of said trial, and before the rendering of the verdict therein, counsel for the plaintiff did take and allege sundry exceptions to the ruling of the court and to his charge and direction to the jury, which several exceptions are hereinafter severally set forth.

21 To maintain the issues on the part of the plaintiffs he proved the importation into the port of New York, in January, 1876, of twenty-four cases of certain merchandize, hereinafter more fully described, which the defendant, as the collector of the aforesaid port, classified as proprietary medicines under the provision for other medicinal preparations or compositions recommended to the public as proprietary medicines, or prepared according to some private formula or secret art as remedies or specifics for any disease or diseases or affections whatever affecting the human or animal body, as found in Schedule M of the Revised Statutes, passed June 22nd, 1874, and levied and collected thereon a duty of fifty per centum ad valorem.

Plaintiffs protested against said action or payment by the following protest:

"NEW YORK, 2 *Feb'y*, 1876.

22 "SIR: We hereby protest against the payment of 50% duty charged erroneously on J. & S. F., 499, 522, cases calcined magnesia ar'v'd p. st'r Java from L'pool, duty paid Jan'y 19, 1876, claiming that under existing laws said goods are only liable to a duty of 12c. per lb. We pay the amount exacted in order to get possession of our goods, claiming to have the same refunded.

"Respectfully, J. & S. FERGUSON.

"Hon. Collector of Customs, Port of New York."

The law upon which plaintiff relied in the aforesaid protest is found in the said Schedule M of the Revised Statutes, and is as follows: "Magnesia carbonate, six cents per pound; calcined, twelve cents per pound."

The merchandize in question was Henry's calcined magesia, prepared by Thomas and William Henry, manufacturing chemists, of Manchester, England, and put up in ounce bottles; in the glass of each bottle was blown the words Henry's calcined magnesia, Manchester; and over one end of each bottle was pasted a stamp, of which the following is a copy: 23

Stamp.	Value above 1s. not exceeding 2-6.	Three Duty Pence 2.	Thos. & Will'm Henry. Manchester.	Office.

It also appeared in evidence that accompanying each bottle thereof was a wrapper; that upon said wrapper was a circular; that of the said labels the following are copies:

"Henry's calcined magnesia.
"Price 2*s.* 9*d.* Stamp included.

"*Caution.*

"The purchasers of this article are requested to observe that the words Thos. and William Henry, Manchester, are engraved on the Government stamp pasted over the cork of each bottle. This is the only effectual security against the counterfeited imitations which are sold in bottles similarly moulded under their names. Trade-mark, 'Henry's Calcined Magnesia.'"

24 "*Caution.*

"Messrs. Thos. & Wm. Henry, of Manchester, have received frequent complaints that their calcined magnesia is counterfeited in the United States, and having been furnished with specimens of spurious and very inferior imitations there vended in bottles similarly moulded, and with forged stamps and bills of direction, beg leave to caution the consumers of their magnesia in America to purchase it only of persons whose character is such as to preclude their selling a spurious article knowing it to be such.

"Druggists and storekeepers are informed that Messrs. J. and S. Ferguson (late Ogden, Ferguson & Co.) merchants. of New York, are the sole wholesale agents authorized by Messrs. Henry in the United States, and that the article may be constantly had of them genuine and on the best terms. Trade-mark, Henry's Calcined Magnesia."

25 That upon the first of the aforesaid labels was pasted a stamp; that the following is a copy thereof:

4. 4.
U. S. Inter. Rev.

Vignette.

Proprietary.

Four cents.

That the following is a copy of the aforesaid circular:

"Trade Mark:

"Henry's Calcined Magnesia.

"Genuine Calcined Magnesia.

"Prepared by

"Thomas and William Henry,

"Manufacturing
"Chemists,
"East St. and St. Peters, Manchester,

"And sold wholesale by them, and in London by Bayley & Company, Cockspur St.; Barclay & Sons, Farmington St.; Butler & Crispe, 4 Cheapside; Edwards, 157 Queen Victoria street; F. Newberry & Sons, 37 Newgate street; J. Sanger & Sons, 150 &
26 252 Oxford street; Sutton (late Dicey & Co.), 10 Bow Church
Yard, and Savory & Moore, 143 New Bond street, in bottles at 2*s.* 9*d.*, or with ground stoppers at 4*s.* 6*d.*, stamps included (the names of the preparers being engraved upon each Government stamp, pasted over the cork or stopper of each bottle, which in British dominions, where the forgery of the stamp is highly penal, is the best security against counterfeits) and retail by at least one agent in every country town.

"Calcined magnesia is highly beneficial in all diseases of the stomach and bowels which are attended with acidity, and gives immediate relief to the heartburn. The effects of excess in eating or drinking are generally relieved by it, and it affords one of the mildest and most pleasant aperients especially to persons who, from a sedentary mode of life or other causes, are under the frequent
necessity of having recourse to laxatives. To persons of a
27 bilious or a gouty habit, it may be recommended with pecu-
liar propriety; and its virtues have been repeatedly testified in the diseases of warm climates. Many of the complaints of children in early infancy and even at more advanced periods are attended with acidity; and in such cases the calcined magnesia has a great advantage over other absorbents, viz: That it both neutralizes the acid in the alimentary canal, and acts as an efficacious yet gentle purgative.

The dose of calcined magnesia required to effect the different purposes varies according to age and other circumstances. To children, at the period of dentition, it may be given in doses of from 4 or 5 grains to 20 or 30, and may be occasionally mixed with thin milk and other aliment to prevent it from turning sour on the stomach. By adults from 20 to 40 grains may be employed as an occasional corrector of acidity, and a drachm or two when
28 intended to operate as a brisk purgative. In the latter case,
if acids be admissible the effect of the magnesia is quickened and increased by drinking after it a glass of lemonade; or, in order to increase its aperient effect, a drachm (equal to about two teaspoonsfull-) of calcined magnesia may be mixed with two or three tablespoonsfull- of lemon juice, or with 20 or 30 grains of crystallized citric acid, the acid being first dissolved in two tablespoons full of water; and the mixture of the lemon juice or acid with the magnesia may be allowed to stand for five or ten minutes, during which it is to be occasionally stirred before it is taken; when given in this way it has been found to be an active aperient and to sit easy on the stomach, when other purgatives have occasioned sickness.

From the discovery of a distinguished chemist, calcined
29 magnesia, in the dose of 20 grains, once, twice, or three times
daily, appears to be an effectual means of relieving one of the most common varieties of stone and gravel, in some cases preventing the fresh formation of calculous matter, in others bringing away considerable quantities of it in the urine. When administered with this view some care is required to insure its beneficial action; for there are different kinds of calculous affections, some of which magnesia is adapted to remove, whereas in others it has no favorable effect, and is even injurious. A very simple and easy experiment, which is in the power of every person to make, will discriminate the varieties. Let a small quantity of the sediment deposited by the gravelly urine on standing be put in a wine glass, and a little dilute muratic acid or spirit of salt or any other dilute acid be poured upon it, and the mixture stirred with a glass or wooden rod or with a quill. If the sediment be of a reddish color, and be not
30 sensibly dissolved by the acid which has been poured upon it,
magnesia may be given with great advantage; but if the deposit from the urine be white, and should disappear in a dilute acid, magnesia may be expected to be injurious. When equally convenient it is desirable to take it either immediately before or after a meal. Should the magnesia (when experiment has shown the propriety of its use) prove too aperient, 5 drops of laudanum may be added to each dose. But if, while it relieves the calculous complaint, it should not act sufficiently on the bowels, in the quantity of 20 or 30 grains, it is advisable, when the use of magnesia is continued for several weeks or months, either not to increase the dose, but to add to it a few grains of rhubarb or some other gentle aperient, or else, if the dose be increased, to mix it with a dessert spoonfull or two of lemon juice, or with half its weight of crystal-
31 lized citric acid, previously dissolved in a little water. The
purity of the crystallized citric acid used to mix with the mag-

nesia is of considerable importance, because the tartaric acid (which is sometimes sold as the citric) is quite unfit for the purpose. It may be proper to add that whenever magnesia produces a white sediment in any considerable quantity from the urine, its use should be suspended.

The superiority of the calcined over the common magnesia alba consists in its operating in less than half the quantity, and in correcting acidity without increasing, like the common or uncalcined magnesia, that flatulence which is generally troublesome to persons of weak digestion. In consequence of improvements which they have made in the manufacture of calcined magnesia Messrs. Henry are enabled to offer to the public their preparation of this medicine, which has already been honored with the approbation of
32 some of the first chemists and physicians of the age, with increased confidence in its superior quality. The calcined magnesia prepared by them will be found to be perfectly deprived of carbonic acid, free from taste, smell, or other disagreeable property, and without roughness or grittiness to the touch or the palate."

Plaintiff's testimony proved that all calcined magnesia is a well-known medicinal preparation of magnesia made from sulphate of magnesia, bi-carbonate of soda, and calcined by heat. A formula for the preparation is contained in the dispensatories, and first-class chemists frequently prepare the article for their own use. The article comes in bulk and is sold at $2.50 per pound.

Henry's calcined magnesia is universally known by that name, and has a character of its own, distinct from ordinary calcined
33 magnesia, though it is used for the same purposes. It has been prepared by the same family, a firm of manufacturing chemists in Manchester, England, for the last one hundred years, and has a peculiar value in the market. It sells in this country at wholesale by the dozen, ounce bottles, for 8.50, and for twenty-seven shillings in England, whereas Husband's preparation, the American preparation of the highest repute, sells at $3.00 or $3.50 per dozen. Henry's preparation has a peculiar reputation on account of the nicety with which it is prepared. Whether it is prepared according to the formula given in the dispensatory no witness knew. There was no dispute upon the above facts in regard to the history of Henry's magnesia and its peculiar value and reputation, and the form and style and representations under which it has been and is presented to the public.

Due proof was made in behalf of the plaintiffs of the pay-
34 ment of duties, the filing of protest and appeal, and the institution of the suit within due time; whereupon, the evidence upon both sides being closed, defendant's counsel moved the court to direct a verdict for the defendant upon the ground that plaintiff had failed to show that his merchandize, viz., Henry's calcined magnesia, is not a proprietary medicine or medicinal preparation within the meaning of that clause of the Revised Statutes passed June 22nd, 1874, under which the defendant, as collector, classified the same for duty.

The plaintiff's counsel thereupon, and before the ruling of the court upon this motion, requested the court to submit the question of fact in this case to the jury, upon the ground that there was no substantial question of fact in the case which was in dispute; and to this refusal of the court the plaintiff duly excepted, which 35 exception was allowed and duly noted.

And thereupon the court, there being no material question of fact in dispute, directed the jury to find a verdict for the defendant.

To this ruling of the court the plaintiff duly excepted, which exception was duly allowed and noted.

The jury thereupon rendered a verdict for the defendant as directed.

Inasmuch as the aforesaid matters of fact and law and the said several exceptions did not appear by the record of said trial and verdict, therefore, on the prayer of said plaintiff by his counsel, said judge signed this bill of exceptions this 13th day of November, 1879, at the October term of said court aforesaid.

(Signed) N. SHIPMAN, *Judge.* [L. S.]

36 (Endorsed:) United States circuit court, southern district of New York. Walton Ferguson *vs.* C. A. Arthur. Plaintiff's bill of exceptions. George S. Sedgwick, attorney for plaintiff.

(Endorsed:) U. S. circuit court. Filed Sept. 1, 1880. John I. Davenport, clerk.

37 Supreme Court of the United States.

WALTON FERGUSON, Pl'ff in Error,
vs.
CHESTER A. ARTHUR, Def't in Error.
} 4842.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said Court, at the Capitol in Washington, came the said plaintiff in error, by George S. Sedgwick, his attorney, and say that in the record and proceedings aforesaid there is manifest error *error* in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given was given for said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to 38 have been given for the said plaintiff against the said defendant; and the said plaintiff prays that the judgment aforesaid, for the error aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that the said plaintiff may be restored to all things which he may have lost by occasion of said judgment, &c.

GEO. S. SEDGWICK,
Attorney for Plaintiff in Error,
140 Nassau street, New York.

Endorsed: U. S. Supreme Court. Walton Ferguson, pl'ff in error, *vs.* Chester A. Arthur, def't in error. Assignment of error. Geo. S. Sedgwick, att'y for pl'ff in error, 140 Nassau St., N. Y. Due service of a copy of the within is hereby admitted, dated

39 September 28, 1881. S. L. Woodford, attorney for defendant in error.

U. S. circuit court. Filed Sept. 28th, 1881. Joseph M. Deuel, clerk.

40 *Joinder in Error.*

Supreme Court of the United States.

Walton Ferguson, Plaintiff in Error,
versus } 4842.
Chester A. Arthur, Defendant in Error.

And afterwards, to wit, on the second Monday of October, in the same term, the said defendant in error, by S. L. Woodford, his attorney, comes here into court and says that there is no error either in the records or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the records and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid
41 given may be in all things affirmed, &c., &c., &c.

S. L. WOODFORD,
Attorney for Defendant in Error.

Endorsed: U. S. Supreme Court. Walton Ferguson, plaintiff in error, against Chester A. Arthur, defendant in error. Joinder in error. Stewart L. Woodford, United States attorney, attorney for defendant in error. Due service of a copy of the within is hereby admitted. New York, September 30th, 1881. Geo. S. Sedgwick, attorney for pl'ff in error. U. S. circuit court. Filed Sept. 20, 1881. Joseph M. Deuel, clerk.

42 *Bond for Damages and Costs.*

Circuit Court of the United States of America for the Southern District of New York in the Second Circuit.

Walton Ferguson, under the firm name of J. & S. Ferguson, Pl'ffs
vs. } 4842.
Chester A. Arthur, Def't.

Know all men by these presents that we, Walton Ferguson, of the city of New York, and Edward Ferguson, of the city of New York, are held and firmly bound unto the above-named Chester A. Arthur, defendant, in the sum of five hundred dollars, to be paid to the said Chester A. Arthur; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 5th & 9th days of November, in the year of our Lord one thousand eight hundred and eighty.

Whereas the above-named Walton Ferguson has prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Walton Ferguson shall prosecute said appeal to effect and answer all damages and costs if he fail to make such appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WALTON FERGUSON. [L. S.]
EDWARD FERGUSON. [L. S.]

Sealed and delivered, and taken and acknowledged, this 5th day of November, 1880, before me, as to Walton Ferguson, and as to Edward Ferguson this 9th day of November, 1880.

SAMUEL W. BOWEN,
Notary Public, Kings Co.

Certified in N. Y. Co.
[L. S.]

ADDISON BROWN,
U. S. Dist. Judge.

Approved:
N. SHIPMAN, *Judge.*

43 UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

Walton Ferguson, of New York, and Edward Ferguson, of New York, being duly sworn, each by himself deposes and says that he is worth the sum of one thousand ($1,000) dollars over and above all his just debts and liabilities.

WALTON FERGUSON.
EDWARD FERGUSON.

Sworn to this 5th day of Nov. A. D. 18—, before me, as to Walton Ferguson, and on this 9th day of Nov., 1880, as to Edward Ferguson.

[L. S.]

SAMUEL W. BOWEN,
Notary Public.

Certified in N. Y. Co.

[Endorsed:] 4842. U. S. circuit court. Walton Ferguson *vs.* Chester A. Arthur. Bond for damages and costs on appeal. Geo. S. Sedgwick, att'y for pl'ff, 140 Nassau St., N. Y. U. S. circuit court. Filed Nov. 10, 1880. Joseph M. Deuel, clerk.

44 UNITED STATES OF AMERICA, *ss:*

To Chester A. Arthur, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on t he seond Monday of October, eighteen hundred and eighty-one, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Walton Ferguson is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

ADDISON BROWN.

Dated New York, Sept'r 27th, 1881.

45 [Endorsed:] 4842. U. S. Supreme Court. Walton Ferguson, plaintiff in error, against Chester A. Arthur, defendant in error. Citation. Geo. S. Sedgwick, att'y for pl'ff in error, 140 Nassau St., N. Y. Due service of copy of within hereby admitted. New York, Sept. 27, 1881. S. L. Woodford, attorney for defendant in error.

Endorsed on cover: S. New York, C. C. U. S. No. 190. Walton Ferguson, plaintiff in error, *vs.* Chester A. Arthur, late collector of the port of New York. Filed 16th February, 1883.

117-482

Office Supreme Court U. S.
FILED
MAR 6 1886
JAMES H. McKENNEY
CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1885.

No. 190.

WALTON FERGUSON

vs.

CHESTER A. ARTHUR.

PLAINTIFF'S BRIEF.

STANLEY, CLARKE & SMITH,
Attorneys,
160 BROADWAY,
New York.

EDWIN B. SMITH,
Of Counsel.

C. G. BURGOYNE'S "Quick" Print, 146-150 Centre St., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1885.

WALTON FERGUSON
v.
CHESTER A. ARTHUR.

No. 190.

Error to Circuit Court, Southern District of New York.

PLAINTIFF'S BRIEF.

Statement.

The question in this case is as to the correct classification for duty of certain magnesia by the plaintiff imported Jan. 19, 1876, per steamer Java, into the port of New York, where he did business under the name of J. & S. Ferguson, of which port the defendant was then Collector.

Schedule M ("Sundries") of section 2504 of the Revised Statutes imposed upon "magnesia, carbonate, six cents per pound; *calcined, twelve cents per pound.*" (R. S., 2nd ed., page 477.)

The plaintiff's claim was, and is, that his importation was dutiable under this last clause. (Rec., p. 8, top.)

That it was "magnesia, calcined" was not denied by the Collector. His contention was that it was so prepared and put up as to be dutiable, under this clause of the same section, as a proprietary medicine, viz:—

"Proprietary medicines: Pills, powders, tinctures, troches or lozenges, sirups, cordials, bitters, anodynes, tonics, plasters, liniments, salves, ointments, pastes, drops, waters, essences, spirits, oils, or other medicinal preparations or compositions, recommended to the public as proprietary medicines, or prepared according to some private formula or secret art as remedies or specifics for any disease or diseases or affections whatever affecting the human or animal body: fifty per centum ad valorem." (R. S., 2nd ed., page 480.)

The merchandise was "Henry's Calcined Magnesia," prepared by Thos. & Wm. Henry, manufacturing chemists at Manchester, Eng., put up in ounce bottles, having "Henry's Calcined Magnesia" blown in the glass, and a three-penny stamp over an end of each bottle.

Upon the wrapper of each bottle was this label:—

"Henry's Calcined Magnesia.
Price, 2s., 9d., Stamp included.
Caution.

The purchasers of this article are requested to observe that the words 'Thos. and Will'm Henry, Manchester,' are *engraved* on the Government Stamp pasted over the cork of each bottle. This is *the only effectual security against the counterfeited imitations*, which are sold *in bottles similarly moulded*, UNDER THEIR NAMES. TRADE MARK, 'Henry's Calcined Magnesia.'" (Record, 8; fol. 23.)

To this label was attached a four-cent United States internal revenue proprietary stamp. There was also a second label of this tenor;—

"Caution.

Messrs. Thos. & Wm. Henry, of Manchester, have received frequent complaints that their Calcined

Magnesia *is counterfeited in the United States,* and having been furnished with specimens of spurious and very inferior imitations, there *vended in bottles similarly moulded,* and with *forged* stamps, and bills of direction, beg leave to caution the consumers of their Magnesia in America, to purchase it only of persons whose character is such as to preclude their selling *a spurious article* knowing it to be such.

Druggists and store-keepers are informed that Messrs. J. and S. Ferguson (late Ogden Ferguson & Co.) merchants of New York are the sole wholesale agents authorized by Messrs. Henry in the United States, and that the article may be constantly had of them genuine and on the best terms. TRADE MARK 'Henry's Calcined Magnesia.'" (Record, 8; fol. 24.)

Accompanying each bottle was this circular-wrapper;—

"TRADE MARK,
'Henry's Calcined Magnesia.'
Genuine Calcined Magnesia
prepared by
Thomas and William Henry, manufacturing Chemists.
East St. and St. Peters, Manchester.

And sold wholesale by them, and in London by Bayley & Company, Cockspur St.; Barclay & Sons, Farringdon St.; Butler and Crispe 4 Cheapside; Edwards, 157 Queen Victoria Street; F. Newberry & Sons, 37 New Gate Street; J. Sanger & Sons, 150 & 252 Oxford Street; Sutton (late Dicey & Co.) 10 Bow Church Yard; and Savory & Moore 143 New Bond Street; in bottles at 2s. 9d. or with ground stoppers at 4s. 6d. stamps included (the names of the PREPARERS being *engraved* upon each government stamp, pasted over the cork or stopper of each bottle, which *in British dominions,* where the forgery of the stamps is highly penal, *is the best security against counterfeits*), and retail by at least one agent in every country town.

Calcined Magnesia is highly beneficial in all diseases of the stomach and bowels which are attended with acidity, and gives immediate relief to the heartburn. The effects of excess in eating or drinking are generally relieved by it, and it affords one of the mildest and most pleasant aperients especially to persons who, from a sedentary mode of life or other causes, are under the frequent necessity of having recourse to laxatives. To persons of a bilious or gouty habit, it may be recommended with peculiar propriety; and its virtues have been repeatedly testified in the diseases of warm climates. Many of the complaints of children in early infancy and even at more advanced periods, are attended with acidity; and in such cases the Calcined Magnesia has a great advantage over other absorbents, viz: that it both neutralizes the acid in the alimentary canal, and acts as an efficacious yet gentle purgative.

The dose of Calcined Magnesia required to effect the different purposes varies according to age and other circumstances. To children at the period of dentition, it may be given in doses of from 4 to 5 grains to 20 or 30, and may be occasionally mixed with their milk and other aliment, to prevent it from turning sour on the stomach. By adults, from 20 to 40 grains may be employed as an occasional corrector of acidity; and a drachm or two when intended to operate as a brisk purgative. In the latter case, if acids be admissible the effect of the Magnesia is quickened and increased by drinking after it a glass of lemonade. Or in order to increase its aperient effect, a drachm, (equal to about two tea spoons full) of Calcined Magnesia may be mixed with two or three table spoons full of lemon juice, or with 20 or 30 grains of crystallized citric acid, the acid being first dissolved in two table spoonsful of water; and the mixture of the lemon juice or acid with the Magnesia may be allowed to stand for five or ten minutes during which it is to be occasionally stirred before it is taken. When given in this way, it has been found to be an active aperient, and to sit easy on the stomach, when other purgatives have occasioned sickness.

From the discovery of a distinguished chemist, Calcined Magnesia, in the dose of 20 grains, once, twice, or three times daily, appears to be an effectual means of relieving one of the most common varities of stone and gravel, in some cases preventing the fresh formation of calculous matter; in others bringing away considerable quantities of it in the urine. When administered with this view some care is required to ensure its beneficial action; for there are different kinds of calculous affections, some of which Magnesia is adapted to remove, whereas in others it has no favorable effect, and is even injurious. A very simple and easy experiment which is in the power of every person to make will discriminate the varieties. Let a small quantity of the sediment deposited by the gravelly urine on standing be put into a wine glass and a little dilute muriatic acid or spirit of salt or any other dilute acid be poured upon it and the mixture stirred with a glass or wooden rod or with a quill, if the sediment be of a reddish colour, and be not sensibly dissolved by the acid which has been poured upon it, Magnesia may be given with great advantage; but if the deposit from the urine be white, and should disappear in a dilute acid, Magnesia may be expected to be injurious. When equally convenient it is desirable to take it either immediately before or after a meal. Should the Magnesia (when experiment has shown the propriety of its use) prove too aperient, 5 drops of laudanum may be added to each dose. But if while it relieves the calculous complaint, it should not act sufficiently on the bowels in the quantity of 20 or 30 grains, it is advisable, when the use of Magnesia is continued for several weeks or months either not to increase the dose but to add to it a few grains of Rhubarb or some other gentle aperient; or else if the dose be increased to mix it with a dessert spoonful or two of lemon juice, or with half its weight of crystalized citric acid, previously dissolved in a little water. The purity of the crystalized citric acid, used to mix with the Magnesia, is of considerable importance because the tartaric acid (which is sometimes sold as the citric) is quite unfit for the purpose. It may be proper to add that whenever Magnesia produces a white sediment in any considerable quantity from the urine its use should be suspended.

The superiority *of the Calcined over the common* Magnesia Alba consists in its operating in less than half the quantity, and in correcting acidity, without increasing (like the common or uncalcined Magnesia) that flatulence, which is generally troublesome to persons of weak digestion.

In consequence of *improvements which they have made* IN THE MANUFACTURE of Calcined Magnesia, Messrs. Henry are enabled to offer to the public their preparation of this medicine, which has already been honored with the approbation of some of the first chemists and physicians of the age, with increased confidence in its *superior quality*. The Calcined Magnesia prepared by them will be found to be perfectly deprived of carbonic acid, free from taste, smell, or other disagreeable property; and without roughness or grittiness to the touch or the palate." (Record, pp. 9 to 11; fols. 25 to 32.)

Plaintiff's testimony proved that all calcined magnesia is a well-known medicinal preparation of magnesia made from sulphate of magnesia, bi-carbonate of soda, and calcined by heat. *A formula for the preparation is contained in the dispensatories*, and first-class chemists frequently prepare the article for their own use. The article comes in bulk and is sold at $2.50 per pound.

Henry's calcined magnesia is universally known by that name, and has a character of its own, distinct from ordinary calcined magnesia, though it is used for the same purposes. It has been prepared by the same family, a firm of manufacturing chemists in Manchester, England, for the last one hundred years, and has a peculiar value in the market. It sells in this country at wholesale by the dozen, ounce bottles, for $8.50, and for twenty-seven shillings in England, whereas Husband's preparation, the American preparation *of the highest repute*, sells at $3 or $3.50 per dozen. Henry's preparation has a peculiar reputation ON ACCOUNT OF THE NICETY WITH WHICH IT IS PREPARED. Whether it is prepared according to the formula given in the dispensatory, no witness knew. There was no dispute upon the above facts in regard to the history of Henry's magnesia and its peculiar value and reputation, and the form and style and representations under which it has been and is presented to the public.

Due proof was made in behalf of the plaintiffs of the payment of duties, the filing of protests and appeal, and the institution of the suit within due time; whereupon, the evidence upon both sides being closed, defendant's counsel moved the court to direct a verdict for the defendant upon the ground that plaintiff had failed to show that his merchandise, viz., Henry's calcined magnesia, is not a proprietary medicine or medicinal preparation within the meaning of that clause of the Revised Statutes passed June 22nd. 1874, under which the defendant, as collector, classified the same for duty.

The plaintiff's counsel thereupon, and before the ruling of the court upon this motion, requested the court to submit the question of fact in this case to the jury, which the court refused to do, upon the ground that there was no substantial question of fact in the case which was in dispute; and to this refusal of the court the plaintiff duly excepted, and his exception was allowed.

Thereupon the court, holding that there was no material question of fact in dispute, directed the jury to find a verdict for the defendant.

To this ruling of the court the plaintiff duly excepted, which exception was duly allowed and noted.

The jury thereupon rendered a verdict for the defendant as directed. (Record, pp. 11, 12, fols. 32 to 35.)

ASSIGNMENT OF ERRORS.

The plaintiff in error assigns for error.

First. The refusal to submit the case to the jury. (Rec., 12, top.)

Second. The direction to the jury to give a verdict for the defendant. (*Ib.*)

Third. The rendition of a verdict for the defendant, by the direction of the court. (Rec., 6; fol. 17.)

Fourth. The entry of judgment in favor of the defendant against the plaintiff. (Rec., 7, top.)

POINTS.

The provision of the Statute wrongfully (as we say) applied to our importation is directed toward "Proprietary Medicines," further defined as being *those* "pills, powders," etc., etc., which are either (1.) "Recommended to the public *as* proprietary medicines, or (2.) prepared according to some *private formula*," etc.

To determine its applicability, we must first ascertain what is a proprietary medicine; then see if ours was recommended to the public as possessing these ascertained characteristics; and, if not, whether it was prepared according to any private FORMULA, etc.

This division of the subject is made to facilitate its discussion, though admitted to be rather arbitrary and superficial; since the obvious purpose of the statute is to duty at 50% those preparations of which a monopoly is maintained, either by means of a patent or by keeping within the maker's own breast the knowledge of its constituents.

That our importation, *in common with all other calcined magnesia*, is a medicine may be admitted.

Berry v. Henderson, L. R., 5 Q. B., 296.

"MEDICINE. 1. Any substance administered in the treatment of disease." Webst. Dict.

The same authority, under the word 'magnesia,' has this;—

" *Carbonate of Magnesia (Med.)*, a white pulverulent earth *used as a mild cathartic*. Calcined Magnesia is the burnt carbonate." (*Id.*)

He adds: "*Sulphate of magnesia;* Epsom salts." (*Ib.*)

This (sulphate, or Epsom salts) is dutiable at *one cent a pound*. R. S., (2d ed.), p. 481, seventh line; where we also find Glauber's Salts ("sulphate of soda—a well-known cathartic." *Webst.*) dutied at one-half a cent a pound.

Congress knew, then, that it was dutying (at twelve cents a pound) *a medicine;* just as much as when, for obvious reasons, it imposed a high duty upon opium and like drugs; or as when it admitted to free entry aloes, angelica root, balm of Gilead, balsam of copaiva, cantharides, columbo-root, and multitudinous other forms of medicinal substances, animal, vegetable and mineral, from A to Izzard; from Aconite to the Wormseed of the Levant.

It dutied thus a simple, uncompounded medicine; by its well-known, *specific*, commercial name.

"In commerce, pure magnesia is generally distinguished by the term *calcined magnesia*."

Brande's Ency., 698, tit., 'Magnesia,'
italicized as it is here.

Magnesia: *one of the primitive earths*, having a metallic basis. *It is not found native in a state of purity*."

McCulloch, Com. Dict., *h. t.*

"Calcined magnesia" is, then, the appropriate, *specific* name of the article. Our importation is simply that, and nothing more. It does not purport, and is not claimed, to be anything else.

This peculiar name, identifying and designating this very article, must prevail over the mere descriptive phrase "Proprietary medicines;" unless there be something in the accompanying definition of that phrase which makes it more closely fit the subject of litigation than does *its own name*!

Arthur v. Davies, 96 U. S., 135.

In a preceding case, in the same volume, it is said:—

"The article in question was chocolate simply, but *presented in a form in which it was ordinarily sold as confectionary.* Was it dutiable as confectionary, or as chocolate?

The case differs from those already decided, in this, that the last act expressing the legislative will is that which imposes the lower rate of duty. It is like the others, in this, that it presents the question *whether the articles are dutiable under general terms which may embrace them, or under that specific language which can be applied to nothing else.* That the latter is the rule by which the duty is fixed is too well settled to require argument."

Arthur v. Stephani, 96 U. S., 126-7,
citing Homer v. Collector, 1 Wall., 486,

where "the court held that as a duty had been imposed upon almonds, *eo nomine*, in previous tariff acts, the article was not, for revenue purposes, within the general term of dried fruit, although in popular language and commercial usage such was its signification."
Reiche v. Smythe, 13 Wall., 162,
And Movius v. Arthur, 95 U. S., 144, 147.

To the same effect is Arthur vs. Rheims, 96 U. S., 143, where it is said:—

"It has been held in many cases [referring to them] that when an article is intended to be made dutiable by a *specific designation*, it will not be affected by the general words of *the same* or another statute, which would otherwise embrace it." 96 U. S., 144, near bottom.

Arthur v. Lahey, *Id.*, 113, ¶ 2, and 118, ¶ 2.
Arthur v. Zimmerman, Id., 125.
Tong Duck Chung v. Kelly, 25 Int. R. Rec., 149.

The distinction, in this respect, between denominative terms and descriptive phrases is recognized and indicated in numerous decisions of this court. Thus, in a recent case, referring *arguendo* to Homer v. Collector, is this passage, (per Blatchford, J.)

"It was contended for the importer that the term 'dried fruits,' in popular meaning, included almonds. The *government* contended that the term 'almonds' was *a specific name, and, therefore, commercial nomenclature had no application.* This court held that inquiry as to whether, in a commercial sense, almonds

were dried fruit, *had nothing to do with the question as a duty had been imposed on almonds, eo nomine*, almost immemorially."

Barber vs. Schell, 107 U. S., 622.

Upon the preceding page of the same opinion, it is said ;

"The designations qualified by the word 'cotton' in the act of 1846, are designations of articles *by special description as contradistinguished from designations by a commercial name* or name of trade. *They are designations of quality and material.*" (*Id.*, 621.)

The opinion then cites language of Judge Nelson, to like effect, adding that the view taken by him is a sound one, viz.; where

"The legislature designates articles by special *description*, as contradistinguished *from a designation by a commercial name*, the proper inquiry is as to their qualities and characteristics, with a view to ascertain if they come within the description."

Reimer v. Schell, 4 Blatch., 309, 310.
Marvel v. Merritt, 116 U. S., 12.

The converse of this must be equally true; that, where the legislature has specially designated an article by its commercial and universal name, no inquiry as to its qualities or characteristics (with a view to bring it within a descriptive clause) is proper.

"We decided in Solomon v. Arthur, 102 U. S., 208, that the mixed-material clause was *descriptive* rather than *denominative ;* and that because goods were made of mixed materials they were not necessarily stamped with the name of mixed goods. Consequently, goods made of mixed materials were not dutiable under that clause if they came properly within any other description contained in the tariff acts."

Fisk v. Arthur, 103 U. S., 433, mid.

Answering the importer's contention (in the case mentioned in the foregoing quotation from the CHIEF

JUSTICE'S opinion), the Court observed, per BRADLEY, J.;

> "The plffs. insist that the term 'mixed materials,' &c., is a *specific* and well-known *commercial designation or name*, which by usage covers the goods imported by them, and is not *a descriptive phrase* used merely to designate any *class* of goods answering to the description. * * *It may be conceded that* IF THE GOODS IN QUESTION HAD A SPECIFIC NAME, such as 'reps,' 'galloons,' etc., AND HAD BEEN DESIGNATED in the acts of 1861-2 BY SUCH SPECIFIC NAME, *the argument of the plffs. would be well founded.*"

Solomon v. Arthur, 102 U. S., 211-2.
Vietor v. Arthur, 104 U. S., 500.
Newman v. Arthur, 109 U. S., 132.
Greenleaf v. Goodrich, 101 U. S., 278, ¶ 3.

Our importation has "a specific name," by which it was designated in the act of 1862 (as well as long prior to, and ever since, that date).

That it is called "*Henry's* Calcined Magnesia" is of no consequence. It is not one whit the less, in law and in *fact*, "magnesia, calcined," for all that. The personal name indicates only by whom the article mentioned in the tariff was put up. It is, nevertheless, *that article*, and only that. Merely indicating the preparer no more takes it out of the category of calcined magnesia than calling a lace made of silk "spot net" or "dotted net" takes it out of the dutiable class of "silk laces."

Drew v. Grinnell, 115 U. S., 477, 481.
Smith v. Field, 105 U. S. 452.
Jaffray v. Murphy, 19 Int. Rev. Rec., 143.

Would "Hoffman's Anodyne," specifically enumerated (R. S., 2d ed., p. 277,) be any less, or any more, that article if put up in bottles, the labels or wrappers of which declared the contents to be pure and "a *superior quality*" of Hoffman's Anodyne?

Whenever an article is invoiced by some trade or commonly-used name (*not* appearing in the Statute) and the Collector classifies it under such clause or descriptive phrase as he deems to be appropriate, a plaintiff can only recover by showing affirmatively the error committed in the classification adopted; but, if a duty is laid upon a *denominated article*, a plaintiff makes out his case and sustains the burden cast upon him by the law when he proves as a fact, by the preponderance of testimony, that his importation is *the* article so designated.

If the Collector contends that certain *other facts* make some clause of the statute, other that its commercial or common designation, applicable to the particular importation in question, the burden is upon *him* to establish these extrinsic facts.

> "The U. S. having classified this article differently from the invoice designation of it, and imposed a higher duty upon it than it would otherwise have been subjected to, the burden is upon the U. S. to satisfy you that there has been a proper classification of this article by the Collector, and that the rate of duty imposed by law only was exacted by him."
>
> Kennedy v. Hartranft, 9 Fed. Rep., 20.

> "The burden is upon the plaintiff, and before he can recover he must prove the truth of his allegation and protest, that this article *is* sago flour. * *
>
> An issue was also made in the pleadings as to whether this article is starch, made from some material other than potatoes, etc.
>
> *This* issue was tendered by the defendant, and in the trial of it the burden of proof is upon *him*."

Chung Yune v. Kelly, 14 Fed. Rep., 641-2.
Com. v. Webster, 5 Cush., 305.
Best on Evi., §§ 305 and 314, note g.
1 Greenl. on Ev., §§ 14, 33.
Starkie on Ev., 586-7.
1 Taylor on Ev., 61, 68, 71, 95 and 97.

Starkie (*ubi sup.*) says;—

"That to put the law in motion it is, of course, essential that the suitor should establish such a state of things as warrants such legal interference ; the law, till that be done, remains quiescent, neither presuming the existence of a right until it be shown to exist by competent means, nor the existence of any fact essential to the right. So, although the law is quiescent until liability be proved, *yet when legal liability has once been established the law does not discharge a party from a legal liability proved to exist, unless such discharge be also established by like means.*" Star. on Ev., 586–7.

Judge Sharswood adds to his (8th Am.) edition of Starkie this note to the foregoing passage ;—

"If the defendant would show matter in avoidance, after a prima facie case has been made out by the plaintiff, the burden of proof shifts upon him"; citing

Gray v. Gardiner, 17 Mass., 188.
Attleboro v. Middleboro, 10 Pick., 378.
Davis v. Jenney, 1 Met., 221, and other cases.
Weiss v. R. R., 79 Penn. St., 390.
U. S. Exp. Co. v. Bachman, 28 Oh. St., 157.
Union Ex. Co. v. Graham, 26 *Id.*, 598.
Graham v. Davis, 4 *Id.*, 362.
Kelly v. Ford, 4 Iowa, 140.
Peck v. Hendershott, 14 *Id.*, 45.
1st N. Bk. v. Hurford, 29 *Id.*, 585.
Throckmorton v. Ryder, 42 *Id.*, 86.
Buzzell v. Snell, 25 N. H., 479.
Yarnell v. Anderson, 10 Mo., 624.
Com. v. Boyer, 7 Allen, 306.
Harford v. Gray, 80 Ill., 31.

See 1 Wharton on Ev., § 357, citing R. R. v. Gladmon, 15 Wall., 406–7, and § 371, citing Kelly v. Jackson, 6 Pet., 631–2, and U. S. v. Wiggins, 14 Pet., 334.

II.

The burden of proof being thus shifted upon him, did the evidence conclusively show (as assumed by the Court below) that the Collector's classification for duty was correct ?

Upon the principle recognized in and established by Arthur v. Stephani, 96 U. S., 126-7, Arthur v. Rheims, *Id.*, 143; Movius v. Arthur, 95 U. S., 144, and the numerous similar decisions cited and uncited, the special denomination—"calcined magnesia"—should prevail over the descriptive clause resorted to by the Collector; so that neither calcined magnesia nor any other medicine *specially enumerated* could properly be deemed a proprietary medicine, *for dutiable purposes.*

This proposition has been already stated.

I. But Henry's Calcined Magnesia is not a *proprietary* medicine in *any* sense.

What is the meaning of the term?

It designates something in which some person claims a proprietorship *as a medicine.*

There must be, not merely asserted ownership of the merchandise as an entity, but *a claim to the proprietorship of the* MEDICINAL PROPERTIES of that merchandise; an assertion either of the *right* in law or of the *power* in fact to exclude others from the making and vending of *that remedial agent.*

It is immaterial whether such a claim be asserted under the legal protection of a patent or by reason of the fact that the composition of the article is a secret concealed within the breast of the claimant; but it is essential that the claim be one of an exclusive ability to manufacture the medicine.

It is not an assertion of *proprietorship*, but of *skill*, for a man to say he can make a well-known article better than anybody else.

Worth's dresses, or Brewster's carriages, are not *proprietary* dresses or carriages because their makers are reputed to be the best in their respective vocations.

Doubtless, a dress made by Worth would (owing entirely to the maker's skill and reputation) cost and bring three times as much as a similar one, of precisely the same materials and general style, from the hands of any other costumer.

An American lady, whose whole wardrobe is not Parisian, would be likely to speak of a garment from his establishment as her "Worth dress"; yet it would commercially be only "wearing apparel," for dutiable purposes, and exempt if brought by the owner upon her return home.

The law does not recognize, nor can the customs officials create, a distinct article of importation distinguished from other importations of the same material only by superior *skill* in manufacture.

Suppose there to have been (as there was, no doubt) among the wearing apparel of the Astors, when they came home, some Worth dresses, costing three or four times the price of other such garments: nevertheless, this fact did not disentitle them to free entry. The sole inquiry was, whether they were the property of members of the Astor family, brought with them for their own use, adapted to the current or approaching season, and suited to their condition in life.

Astor v. Merritt, 111 U. S., 202.
R. R. v. Fraloff, 100 U. S., 24.

So, a carriage, actually dedicated to and intended for personal use, would be entitled to come in free as "household effects," even though the name of a 'crack' maker should give it an adventitious value, far above that of like vehicles coming from shops less well-known.

Arthur v. Morgan, 112 U. S., 495.

Under a more careful analysis of the statutory language and of the label and circular accompanying the magnesia, *infra*, it will be fully demonstrated that the Henrys *made no claim to any personal right to prepare this precise article;* but only to the possession of such experience, care and skill as enabled them to do it well:—better, in fact, than other persons actually *did* do it, but not differently from what others legally *might.*

We will now recur to our definition of a "proprietary medicine"—as being one in which somebody claims the ownership *of the medicinal qualities*—for the purpose of fortifying it by authority.

They are commonly spoken of as "patent" medicines, because it is understood that the proprietors claim to possess, practically (whether, in fact, protected by a patent or not) the exclusive right which a patent secures;—i. e., either the composition or machine, or the effect and result which the combination or machine produces.

They are so treated in the Customs Regulations:

> "ART. 452. 'Patent or secret medicines' are by law subject to the same examination and disposition as other medicinal preparations," etc.

McElrath's "Dictionary of Words and Phrases used in Commerce" is the work of the "late chief-appraiser of foreign merchandise for the port of New York." He thus defines

> "MEDICINAL PREPARATIONS; *Compound* medicines, prepared according to a formula recognized by the medical faculty, and adopted in the authenticated pharmacopœias or dispensatories of the country [of production.] *Preparations of medicine made according to secret or unrecognized formulas are usually called patent medicines.*"

Webster gives these definitions;—

> "PROPRIETARY, *n.* 1. A proprietor or owner; *one who has the exclusive title to a thing;* one who possesses or holds the title to a thing in his own right.
>
> PROPRIETARY, *a.* Belonging, or pertaining, to a proprietor."

Applying this to the same lexicographer's definition of medicine (given *ante*, p. 8) and we have, as a proprietary medicine, a medicine or remedy, belonging, *as such*, to an owner or proprietor who has the exclusive title thereto.

2 Abbott's Law Dict., *h. t.*

II. Not being, in fact, a proprietary medicine, neither is Henry's Magnesia "recommended to the public" as such.

It will be noticed that the statutory phraseology clearly contemplates *compounded* medicines; this is a well-known simple substance.

See the definition from McElrath's Com. Dict., quoted *ante*, p. 17.

The medicines recommended to the public as proprietary are those "patent medicines" which the proprietor claims to have *discovered:* perchance, as he was disconsolately, gloomily, wandering through the pastures, convinced that he was afflicted with an incurable disease, advised by physicians to abandon hope, and told that he was one for whom

> "The fields have no medicinal leaf,
> Nor the vexed ore a mineral of power,"

he carelessly plucks the leaves, or chews the root or branches, of plants or trees bordering his path, and suddenly perceives that their juice has "gone to the right spot," and that he has stumbled upon a panacea for all human ailments!

We all know the protean forms and guises in which this pretence of a wonderful discovery appears; fortified by certificates from mythical residents of remote regions, attesting miraculous cures, etc., etc.

Nothing of this kind accompanies Henry's Magnesia.

True, it is put up nicely in bottles, with or without a ground stopper (to prevent the absorption of water or carbonic acid) but that does not affect the question.

The bottles are dutied as entirely independent importations, according to their own value.

Schmidt v. Badger, 107 U. S., 85.
Merritt v. Stephani, 108 U. S., 106.
Merritt v. Park, *Ib.*, 109.

Separating them for dutiable purposes, the bottle paying the same duty as if brought here empty, why should not the contained article also pay the duty appropriate for the thing which (detached from the bottle) it really is?

This Court have already held that mere form and daintiness of putting up would not change the dutiable classification of an enumerated article;—that 'chocolate' continued to be chocolate, for assessment of duty, even though wrapped in silver or fancy paper, tied up with gay ribbons, and sold as "confectionery" or bonbons.

Arthur v. Stephani, 96 U. S., 125.

The presence of the English stamp over the stopper, if unexplained, would amount to nothing, in the absence of evidence as to the requirements of English law; but it *is* explained by the label which shows that it is used solely because it is the "ONLY effectual *security against counterfeited imitations*, which are sold in bottles *similarly moulded, under their* [the Henrys] *names*. Trade-mark, Henry's Calcined Magnesia." (Record, 8, middle: *ante*, p. 2).

There is nowhere any pretence that the article is anything else than calcined magnesia, pure and simple.

Being authorized to use stamps upon which are engraved "the names of the PREPARERS"—not makers, even, much less inventors, discoverers, or patentees—"which, in British dominions, where the forgery of the stamp is highly penal, is the best security against counterfeits," (Record, 9; fol. 26,) they do this, and claim the benefit of a *trade-mark* also. (Record, 8, 9.)

Resort to a *trade-mark* as protection for their *labor* and *skill* is, virtually, a disclaimer of any right as an inventor or discoverer of the article made.

"The ordinary trade-mark has no relation to invention or discovery."

Trade-Mark Cases, 100 U. S., 94, near top.
Mfg. Co. v. Trainer, 101 *Id.*, 53, lower part.
Farina v. Silverlock, 6 DeG., M. & Gr., 214.
Collins v. Brown, 3 Kay & J., 423.

"A person entitled to a trade-mark is called a 'proprietor' *of the trade-mark*"—not of the right to make the goods.

2 Rap. & Law. L. D., tit., "Proprietor."

"Every man has a right to the products of his own labor, and is entitled so to distinguish them that persons dealing in or purchasing his commodities may be readily able to recognize them as his. The maker may, therefore, either with or without the use of his name, adopt a word, title, symbol, or figure to designate the ownership or manufacture of the goods. In the use of such 'trade-mark' he is to be protected from the efforts of others who would take advantage of his enterprise or skill' and, by imitation, endeavor to impose upon the public and to deprive him of the just reward of his industry."

The adoption of a trade-mark or device to indicate the manufacture or origin of a certain article does not give any right to the exclusive production of the article so marked. Any article of manufacture, unless it be protected by a patent, may be made and sold by any person. * * the only restriction is that each party shall stand upon his own merits," etc., etc. * * *

A word which is the *name* of the article, or indicates its quality, cannot be so appropriated. Every one has the right to manufacture the same article, and to call it by its name or descriptive character. * *

The name of an article cannot become the exclusive property of the maker, especially if that article is a known substance or production. IT COULD NOT BE SUPPOSED THAT THE EXCLUSIVE RIGHT TO PREPARE THE EXTRACT OF A PARTICULAR FLOWER OR A MEDICINAL BARK COULD BE OBTAINED MERELY BY THE USE OF THE NAME OF

SUCH FLOWER OR BARK. Could it be tolerated that one manufacturer alone should have the right to make the extract of roses or of Peruvian bark, because he adopts the name only ?"

Phalon v. Wright, 5 Phila., 464–5,
Singleton v. Bolton, 3 Doug., 293;
citing Canham v. Jones, 2 Ves. & B., 218;
Am. Mfg. Co. v. Spear, 2 Sandf., 599;
Stokes v. Landgraff, 17 Barb., 608,
Fetridge v. Wells, 4 Ab. Pr., 144.
and Wolf v. Goulard, 18 How. Pr., 64.

One would suppose no legislation necessary to prohibit a discrimination, as to goods *specifically* dutied, between those protected by trade-mark and those not; since, in either case, the article is alike *the thing* specially enumerated, the trade-mark only signifying a fact immaterial to the customs-law and its administrators, viz., the persons by whom the enumerated article is, in any given instance, prepared or put upon the market.

The reputation of such persons may affect the *market value*, but not the *dutiable character* of such specifically dutied goods.

As to certain goods paying duty ad valorem, Congress had to interfere to say that, however a trademark might in fact affect the foreign market value, *no discrimination* should be made, in levying duty, between those so protected and those not.

The act of March 3, 1873, c. 232, § 4 (17 Stats., 559) is thus reproduced in R. S.,

> " Sec. 2913. In the appraisement of kid and all other gloves imported into the United States there shall be *no discrimination* in determining by appraisement the foreign market value of such goods, *whether protected by trade-mark or not*; and in no case shall gloves so protected by trade-mark be appraised at a less foreign market value than the like goods not so protected; and no sale or pretended sale of such goods shall be held to fix the value of the same."

As will be further and more analytically noticed presently, there is no claim by the Henrys of their preparation having any effe[illegible]ifferent from that attributed to *all* " magnesia, calcined " ; nor that it is valuable for any other purpose, or in any other diseases, than those to which all calcined magnesia is always applied.

> " Calcined magnesia [not simply " *Henry's* Calcined Magnesia "] is highly beneficial in all diseases of the stomach," etc. (Rec., 9 ; fol. 26.)

See also, Rec., p. 10, top ; middle ; 11, near top ; and *passim.*

ALL the claim made by the Henrys is that of particularly careful manipulation, whereby foreign substances are completely eliminated, so that the importation becomes most emphatically *the very thing* named in our tariff—" magnesia, calcined "—and *nothing else !*

Here is *all* there is of individual claim :—

> " In consequence of improvements which they have made *in the manufacture of* CALCINED MAGNESIA Messrs. Henry are enabled to offer to the public *their preparation of this medicine*, which has already been honored with the approbation of some of the first chemists and physicians of the age with increased confidence *in its* SUPERIOR QUALITY. The calcined magnesia *prepared* by them will be found to be perfectly deprived of carbonic acid, free from taste, smell, or other disagreeable property and without roughness or grittiness to the touch or the palate." (Rec., p. 11 ; fols. 31, 32.)

It will be seen that *all* they claim for their preparation of a well-known article is *purity.*

This it has long been the special object of our legislation to attain, particularly with reference to drugs and medicines ; for which purpose custom laws have been enacted and retained upon our statute-books for nearly forty years, and regulations framed for carrying them out ; instead of affecting this quality with an excessive and prohibitory duty.

The act of June 26, 1848, c. 70, §§ 1 to 3 (9 Stats., 257) upon this subject appears in the revision as sections 2933-5.

"Sec. 2933. All drugs, medicines, medicinal preparations, including medicinal essential oils and chemical preparations, used wholly or in part as medicine, imported from abroad, shall, before passing the custom-house, be examined and appraised, as well in reference to their *quality*, *purity*, and *fitness* for medical purposes, as to their value and identity specified in the invoice.

Sec. 2934. All medicinal preparations, whether chemical or otherwise, usually imported with the name of the manufacturer, shall have *the true name of the manufacturer* and the place where they are prepared, permanently and legibly affixed to each parcel by stamp, label, or otherwise; and all medicinal preparations imported without such names so affixed shall be adjudged to be forfeited.

Sec. 2935. If, on examination, any drugs, medicines, medicinal preparations, whether chemical or otherwise, including medicinal essential oils, are found, in the opinion of the examiner to be so far adulterated, or in any manner deteriorated, as to render them inferior in strength and purity to the standard established by the United States, Edinburgh, London, French, and German pharmacopœias and dispensatories, and thereby improper, unsafe, or dangerous to be used for medicinal purposes, a return to that effect shall be made upon the invoice, and the articles so noted shall not pass the custom-house, unless, on a re-examination of a strictly analytical character, called for by the owner or consignee, the return of the examiner shall be found erroneous, and it is declared as the result of such analysis, that the articles may properly, safely, and without danger, be used for medicinal purposes."

Subsequent provisions entitle a dissatisfied importer to obtain "a careful analysis," by an impartial chemist of high repute, of his articles; and to re-export them, if this be against him. R. S., Secs. 2936, 2937, *et seq.*

In the Treasury Regulations of 1857 appear those pertaining to the enforcement of this law; similar to those found in the compilation of 1874 (in force when our goods were imported), literally reproduced in that of 1884, under the existing tariff.

Chapter IV. Part III. of the Treasury Regulations of 1874 is devoted to this subject, embracing sixteen articles, from ART. 449 to ART. 464, inclusive.

ART. 449 requires the special examiner of drugs to unite with the appraiser in the examination of drugs and medicines.

"If drugs and medicines form part of an invoice, *a separate entry may be made of the other merchandise*, TO AVOID THE DELAY REQUIRED IN THE EXAMINATION OF THE DRUGS.

Should drugs or medicines, or any part thereof, on examination, be found unfit for use as medicine, they will be exported or destroyed by the Collector, as provided by law."

ART. 450 repeats the statutory requirement, that "all imported drugs, medicines and medicinal preparations are to be tested with reference to strength and *purity* by the standard established" by the pharmacopœias mentioned; and adds that articles must "prove to conform *in strength and purity* to the pharmacopœia and dispensatory of the country of their origin," if that be one of the mentioned foreign nations; otherwise, they "must conform to the U. S. pharmacopœia and dispensatory."

"ART. 451. All articles of merchandise used wholly or in part as medicine, and found described as such in the standard works specially referred to in the act, must be considered drugs and medicines;" and examined accordingly.

"ART. 452. Patent or secret medicines are by law subject to the same examination," etc., etc.

ART. 453 contains "a list of some of the principal articles," &c.; but magnesia, in any form, does not appear in it.

"ART. 454. All medicinal leaves, flowers, barks, roots, extracts, &c., not herein specified must be, when imported *in perfect condition*, and of as recent collection and *preparation* as practicable.

All pharmaceutical and chemical preparations, whether crystallized or otherwise, used in medicine, must be found on examination to be *pure* and of proper consistence and strength, as well as *of perfect manufacture,* conformably with the formulas contained in the standard authorities named in the act; and must in no instance contain over three per cent. of excess of moisture or water of crystallization.

Essential or volatile oils, as well as expressed oils, used in medicine, must conform in purity to the standards of specific gravity noted and declared in the dispensatories mentioned in the act.

ART. 455. Upon the entry of 'medicinal preparations, whether chemical or otherwise, usually imported with the name of the manufacturer, and the place where prepared,' careful examination must be made by the United States appraisers to see that *the true name of the manufacturer*, and *also the place where said articles were prepared*, are 'permanently and legibly affixed to each parcel by *stamp*, label, or otherwise.' In default of these requisites, the collector will immediately report the facts to the district attorney."

The subsequent Articles refer to the proceedings for forfeiture, method of examination, etc., etc.

Brief reference may be here made to the presence of a U. S. internal-revenue proprietary stamp upon each bottle, *at the date of entry;* this being the time at which the legal status of the importation is to be ascertained.

The reason for affixing this stamp may have been the same as that for putting on the English one; viz., as a protection against a fraudulent use of the Henry name; since a false use of their design, or a false use of initials and signatures, &c., in cancellation, would be punishable by law.

R. S., Secs. 3423, 3425, and 3429.

Or, it might be to avoid any trouble or controversy with our internal-revenue or customs officials.

In this connection, it may be noticed that the Commissioner of Internal-Revenue had, prior to and at the date of this entry, promulgated an absurd 'rule', that the use of a person's name, in the possessive case, should ipso facto be deemed to constitute a proprietary claim to any medicine so designated, and render it liable to be stamped.

In September, 1881, the writer came to Washington, in behalf of A. J. White of New-York, who put up and vended a medicine called "Mother Seigel's Syrup, or the Shaker Extract of Roots," which was held by the Commissioner to be subject to stamp *solely* because of the use of the name Seigel's, in the possessive form, the legal requirements to exempt it being otherwise, undeniably, complied with. The question was argued, orally and by written brief, before both the Commissioner and Solicitor of Int. Rev., upon the ground that Seigel's Syrup, *per se*, no more indicated proprietorship than Dover's Powders, Fowler's Solution, Gunter's Scale, or Farenheit's Thermometer ; and that the latter no more constituted a claim of ownership than did "Centigrade,," etc., etc.

The result was that on the fifth day of November, 1881, the Commissioner abandoned the theory which had been theretofore the basis of action, reversed his ruling, and exempted Mr. White's medicine from stamp-duty.

This is matter of public record in that bureau of the Treasury Department.

Commr. Raum, in announcing his determination, said;

> "This [the use of Madame Seigel's] name does not imply, and is not equivalent to, a proprietary claim, but is only descriptive ; and is used to designate and distinguish the article from other Extract of Roots."

But, prior to Nov. 5, 1881, the only safe way for a person who, here or abroad, put up, for use in the U. S., any medicine designated in part by the name of the originator or preparer was to affix a stamp ; and this the Henrys did.

Perhaps the language of R. S., Sec. 3436, commencing "No stamp-tax shall be imposed upon any uncompounded medicinal drug or chemical," might (referring to the last provisory clause of the section, as amended by the act of Feb. 8, 1875, c. 36, § 22) be fairly construed as requiring a stamp; but, if so, it is because of the employment of phraseology strikingly dissimilar to that of the tariff act, under which duty was exacted from us.

"PROPRIETARY, *adj.* Belonging to an individual; *private;* considered as property; owned.
PROPRIETARY ARTICLES. In the U. S. internal revenue laws; are goods manufactured under some *exclusive individual right* to make and sell them."

2 Abbott's Law Dict., *h. t.*

II. This was a well-known simple substance, and *not a* "*composition* * * prepared according to some private formula or secret art," etc.

We have before noticed that the enumeration seemed to embrace *compounds* only.

The use of the word 'formula' sustains the same idea.

"FORMULA. (*Med.*) A prescription or recipe.
(*Chem.*) An expression by means of symbols and letters of *the constituents of a compound.*" Webst. Dict.
"PRESCRIPTION, a recipe." (*Id.*)
"RECIPE. A formulary or prescription for making some *combination or mixture* of materials; especially, a prescription for medicine." (*Id.*)

While $x^2-z^3=a^2+b^3$ is an algebraic formula, x alone is not a *formula*, even though it does represent an unknown quantity.

What this medicine *is*, is no secret. It is *the* very thing named in the statute; a well-known simple substance. It is nothing else. There is no claim or pretext of its being aught else. Neither is there any secret as to its qualities and effects. They are those ordinarily belonging and attributed to "magnesia, calcined"; none other or different are claimed for it.

It is *their make* of this well-known article that the Messrs. Henry endeavor to protect by stamps and trade-mark. (Rec., 8, 9.)

It is "calcined magnesia," by whomsoever calcined, that is recommended as "highly beneficial" in bowel complaints, and giving immediate relief to heartburn. (Rec. 9, fol. 26.)

It is this substance, and not the contents of their bottles merely, which mitigates the effects of excess, and affords the mildest and pleasantest aperient; recommended to the bilious and gouty; and of great virtue in the diseases incident to warm climes, and to infancy and childhood. (*Ib.*, and fol. 27.)

> "I find a substance which, by its smell and color, I know to be opium. Without any further information, I decide with confidence on its taste, its composition, its chymical affinity, its action on the human body, and the characters of the plant from which it is derived; and I never calculate upon being deceived in any of these particulars."
>
> Abercrombie, Intel. Pows., 160.
> (Harpers' Fam. Lib. ed.)

Is not this true of calcined magnesia? and of Henry's, as well as of that prepared by others? Yet it would *not* be true of a proprietary medicine.

What has been said of the diseases for which calcined magnesia is to be administered is equally true of the method of administration suggested; that they are not peculiar to this *brand* of the article.

"The dose of calcined magnesia required to effect the different purposes varies according to age and other circumstances;" as the circular proceeds to state; the particular make of the magnesia *not* being one of the 'circumstances' mentioned. (Rec., 10, top.)

Referring to the part of the record indicated, it will be found that the entire dissertation relates to calcined magnesia generally.

Ex gr., at the middle of the page (10) the paragraph begins;—

> "From the discovery of a distinguished chemist, calcined magnesia, in the dose of twenty grains, once, twice or three times daily, appears to be an effectual means of relieving one of the most common varieties of stone and gravel," etc., etc.
>
> (Rec., 10; fol. 29; *ante*, p. 4, bot.)

Certainly, here is no pretence, nor could any one properly infer a claim, that "the discovery of a distinguished chemist" was accomplished by the use of magnesia calcined by them; or that *such* calcined magnesia was essential either to the discovery or to effect the discovered benefits.

Their circular-wrapper states that

> "The superiority of the calcined over the common magnesia alba consists in its operating in less than half the quantity, and in correcting acidity without increasing, like the common or uncalcined magnesia, that flatulence which is generally troublesome to persons of weak digestion."
>
> (Rec. 11, near top; fol. 31; *ante*, p. 5, bot.)

This sets out no peculiarity, or makes no discrimination, between magnesia of their calcination and that calcined by others; it only states the difference between the common, uncalcined magnesia and that which had been subjected to calcination *by anybody*.

What follows, however, does state an alleged superiority of their calcined magnesia over the calcined magnesia of others.

> "In consequence of improvements which they have made *in the manufacture of calcined magnesia*, Messrs. Henry are enabled to offer to the public *their preparation of this medicine*, which has already been honored with the approbation of some of the first chemists and

physicians of the age, with increased confidence in its SUPERIOR QUALITY. The calcined magnesia prepared by them will be found to be perfectly deprived of carbonic acid, free from taste, smell, or other disagreeable property, and without roughness or grittiness to the touch or the palate." (*Ibid.*)

Here is no *such* claim as the statute intends.

The statutory phraseology requires that the "remedies or specifics" must be of unknown character; compounded by "private formula," or its composition a "secret art," so that the result—the thing sold as a remedial agent—shall be of unknown constituents and proportions. The *medicine* must be "patented"; a private, individual concern; a "secret."

This is not true of Henry's Calcined Magnesia.

The medicine itself is not pretended to be aught but the well-known, enumerated substance, universally designated by this name, having the ordinary medicinal objects and effects, and none other. *All* that is claimed is such an exercise of care, skill and improved methods in its manufacture as result in a "*superior quality*" of a well-known medicament.

While it cannot be the purpose of the law to treat as "proprietary" every common drug pounded with a patent pestle, or calcined in a superior (or patented) roasting apparatus, it must be noticed that Messrs. Henry lay claim to *no exclusive right*, no private operation, no *secret* art, in their manipulation of this magnesia. They do not say that others cannot, nor that others do not, make just as good an article.

All they say is, whatever other chemists may do, the approbation of the faculty and of the profession, and the test of time and experience, prove that the product of our improved methods is a "superior quality" of this article. This does not mean, nor imply, an *exclusive* superiority, but merely better than the average.

"Pillsbury's BEST" flour is none the less "flour" (*and* *nothing else*), because it is a brand of "superior quality" of that article.

"*All* calcined magnesia is a well-known medicinal preparation of magnesia" made from substances and by a method stated in the record, according to a formula contained in the dispensatories and "frequently" practised by chemists. (Rec., 11 ; fol. 32.)

Henry Calcined Magnesia is known distinctively, as having a character of "superior quality" acquired by a century of experience, care, skill and integrity ; nevertheless, it *is* but calcined magnesia, and is sold "for the same purposes" as that prepared by others.

The market-value is, naturally, affected by the repute of the preparation ; Husband's, the best-reputed American article, sells much higher than the article in bulk. Yet, it is conceded that the distinctive character of Henry's preparation is "a peculiar reputation *on account of the nicety with which it is prepared.*" (Rec., 11 ; fols. 32 and 33). Its peculiarity is, then, not one *necessarily* inherent (except as care, honesty, and skill are transmitted from generation to generation) in the article. Its *quality* is its recommendation ; and this is not shown to be attained by any "private formula, or secret art," even *if that would satisfy the statute.*

"Whether it is prepared according to the formula given in the dispensatory, no witness knew." (Rec. 11 ; fol. 33.)

That it was a proprietary medicine, put forth as such, "prepared according to some *private* formula or *secret* art" was an issue tendered by the defendant, and the burden was upon *him* to prove it.

Chung Yune v. Kelly, 14 Fed. Rep., 642, top, and numerous authorities cited *ante*, pp. 12–14.

When we had proved it to be calcined magnesia, designed for and adapted to the ordinary medicinal uses of that enumerated article ; and had further shown that the method of its preparation was well-known to the profession, and given in the scientific books named in the Statutes and Treasury regulations, the burden of showing it to be something else than the mentioned article, by reason of its having been "prepared by some private formula or secret art," was upon him who alleged such a state of facts. (*Ib.*)

At least, *we were entitled to go to the jury upon the facts proved.*

III.

It was error not to submit this cause to the jury, with appropriate instructions.

Where there is evidence which, in any way *tends* to prove the plaintiff's case, it is the duty of the Court to submit it to the jury.

Drakely v. Gregg, 8 Wall., 243, 268.
Hickman v. Jones, 9 *Id.*, 197, 201, bottom.
Stephens v. Brooks, 2 Bush, 137, 140.
Parker v. Leman, 10 Tex., 119.
Way v. R. R., 35 Iowa, 585.
McGown v. Craig, 39 Mo., 156.
Singleton v. R. R., 41 *Id.*, 465.
Steinmetz v. Wingate, 42 Ind., 472.
Everett v. Stowell, 14 Allen, 32.
Ins. Co. v. Rodel, 95 U. S., 238.

It would not be sufficient, if true, that there was no dispute as to the facts proved. There could be none, that this calcined magnesia was not, in *fact*, a proprietary medicine; i. e., not an article of which Messrs. Henry, or anybody else, claimed to own the medicinal character.

Whether dutiable as proprietary, under the statute, depended upon the *facts*, whether it was such; or whether it was so "recommended to the public"; or, was compounded according to private formula or secret art.

Either of these must be established as a *conclusion of fact*, from facts proved; i. e., must be made out to the satisfaction of a *jury*.

Though there might be "no dispute" as to the existence of the facts stated to be proved, yet there might be (and was) a very decided disagreement as to the *inference of fact* which the jury were authorized to draw from proven facts.

Hence, it was error to take the case from them; still greater error, to do so upon the ground that the plaintiff had not established, to the satisfaction of the Court, the *negative* of an issue tendered by the defendant. (Rec., 11, bot., fol. 34.)

We claim there was evidence to satisfy a *jury* that he had even done this.

> " It is insisted with much ingenuity that in this case there was no disputed fact for the jury to pass upon, and that the only issue in the case being one of law, it was proper for the court to dispose of it. If this were so, the instruction of the court might be sustained, provided the undisputed facts necessary to sustain the verdict had been submitted to the jury. But let us see if this assumption is supported by the record. The form of the pleadings shows nothing and admits nothing. The plaintiffs then must make a case by evidence to the jury. Looking into the case stated and as though it *had* been read to the jury, we find that plaintiff's claim is for duties on certain goods unlawfully collected of him by defendant as collector of the port of New York. The act under which the goods were rated for duties provides that on all delaines, cashmere delaines, muslin delaines, barege delaines, comprised wholly or in part of worsted, wool, mohair, goat's hair, and *on all goods of similar description*, not exceeding fifty cents in value per square yard, two cents per square yard shall be paid. And the point in dispute was whether the goods of plaintiffs, on which the two cents per yard had been assessed, were goods of a similar description to those above mentioned, within the meaning of the act. Now

it is clear that this question alone is one of mixed law and fact, because until we are informed by this testimony as to the nature and character of plaintiff's goods, no construction or view of the law can be applied to them. The court can only know by evidence what kind of goods were assessed by the collector, and this at once dispels the idea that the case could in any sense present an abstract question of law. But before the court or the jury could get to these questions there were several others, purely matters of fact, to be decided. The rate at which the goods were actually assessed, the protest at the time of payment, and the appeal to the Secretary of the Treasury, were all essential to the plaintiff's recovery and necessary to be found to the satisfaction of the jury. The judge also tells us that 'there is very little discrepancy in the testimony.' But where there is any discrepancy, however slight, the court must submit the matter to which it relates to the jury, because it is their province to weigh and balance the testimony and not the court's. The position is not, therefore, sustained, that nothing but a question of law was to be decided."

Schmeider v. Barney, 9 Wall., 252-3.

The same question,—as to "goods of like description,"—was held properly submitted to the jury in
Greenleaf v. Goodrich, 101 U. S., 278,
and Schmeider v. Barney, 113 *Id.*, 645.

The *ground* for requiring its submission was that it was "one of *mixed law and fact.*" (9 Wall., 252, bottom.) Yet it is no more so than whether an article is "*recommended to the public* as a proprietary medicine"; or "prepared according to some private formula"; or "secret art"; as a "*remedy or specific* for any disease," etc.

We submit that the context shows that this last clause intends that the pill, powder, or composition shall be held out as a *specific remedy* for some particular disease; as cundurango for cancer, quinine for malaria, etc. The first of these illustrations was protected by patent or privacy, and would be dutiable as a proprietary medicine; the second is of common knowledge, and (*being specifically enumerated* like calcined magnesia) would not be so dutied, even if accompanied by a wrapper which *truly* declared the article to be prepared with especial care, and as good for malaria, or as a tonic.

We contend that, instead of refusing to submit the cause at all, the judge should have given it to the jury with appropriate instructions upon these points.

We have already argued that an article specifially mentioned cannot be swept into a general clause by any accompanying recommendation, which claims it to be nothing other than just *the* thing specified; and that the wrapper covering our calcined magnesia set up no proprietary claim, but only the true one of an exercise of unusual care and skill in the preparation of *the specified thing:*—what we now assert is that, at all events, the question whether we did recommend it as a proprietary medicine, etc., should have been left to the jury—because it is one of mixed law and fact.

That such questions are for the jury is a principle too well established to permit citation of authorities; (see *supra*) but we add a few, indicating what questions have been held to be of this character.

> " In patents for machines, the sufficiency of the description [in the specification] must, in general, be a question of fact for the jury."
>
> Wood v. Underhill, 5 How., 4.
>
> " By whatever motives the defendant may have been actuated, he is not to be held responsible unless *his letters* did mislead, and were intended to mislead, the plaintiffs. And it will be *for the jury* to say, on a thorough examination of the *letters*, and *the facts and circumstances connected with them*, whether they were calculated to inspire, and did inspire a false confidence," etc., etc.
>
> Iasigi v. Brown, 17 How., 196.

It will be noticed that our citations are of cases where the testimony was in writing; and the claim that it was exclusively for the Court was based upon that fact. Sixty years ago, the CHIEF JUSTICE of the United States observed;—

"That testimony consists of various communications and reports, made to the bank, of their own transactions, and of the admissions of parties. *It has been said that this testimony was all in writing, and is to be construed by the Court;* and *from this proposition is deduced the corollary that the jury was not at liberty to draw inferences from it.*

Were the fact as alleged, and were it true that the testimony is all in writing, the consequence drawn from it cannot be admitted"; for reasons which the C. J. proceeds to state, and which are particularly applicable to the cause at bar.

Etting v. Bank, 11 Wheat., 75, *qu. vid.*

"The jury were the proper judges of the inferences of *fact* to be drawn from the papers. The *legal effect* of papers is to be determined by the Court, but *when documents are offered in evidence as the foundation of an inference of fact, whether such inference can be drawn from them is a question for the jury.* The most authentic documents, when offered for such a purpose, become no more than mere letters or a written correspondence, which, when offered in evidence to prove a fact, are always to be interpreted by the jury. When documents are offered for such a purpose, they, like a written correspondence, may be explained by extrinsic evidence."

Primm v. Haren, 27 Mo., 211, top.
Horne v. Puckett, 22 Tex., 201-5.
Fennerstein's Champagne, 3 Wall., 145.

"Where the effect of a written agreement collaterally introduced as evidence (as in this case) depends not merely upon the construction and meaning of the instrument, but upon extrinsic facts and circumstances, the inferences of fact to be drawm from it must be left to the jury."

Barreda v. Silsbee, 21 How., 168.
West v. Smith, 101 U. S., 270.
Kean v. Wagenblast, 2 Grant's Cas., 462, BLACK, J.

Robinson v. Burton, 1 Houst., 540, HARRINGTON, CH.
McDonald v. Rooke, 2 Bing., N. C., 218.
Ashford v. Redford, 9 L. R., C. P., 20.
Alexander v. Vanderzee, 7 *Id.*, 530.
Brook v. Hook, 6 L. R., Exc., 89.
Wilkinson v. Stoney, 1 J. & Sy., 509.
Bolckow v. Seymour, 17 C. B. (N. S.), 107.
Frier v. Jackson, 1 Johns., 495.
Borrowdaile v. Leek, 9 Barb., 611.

" If the document is connected with other evidence, affecting its construction, then *the whole must be submitted to the jury together*."

1 Taylor on Ev., § 43, last sentence.
1 Gr. on Ev., § 49, citing
1 Stark. on Ev., 510, 519-526.

[Mem: Foreign laws are questions of fact for the jury, even if proved by copies authenticated by the broad seal of a foreign state.]

There were " extrinsic facts and circumstances," connected with the phraseology of the circular-wrapper, which required the submission of the whole to the jury.

" Plaintiff proved that ALL calcined magnesia [this, of course includes that put up by Henry, Husband, Ellis, or whomsoever] is a *well-known* medicinal preparation of magnesia, made from sulphate of magnesia, bi-carbonate of soda, and calcined by heat. *A formula for the preparation is contained in the dispensatories*," etc. (Rec., 11 ; fol. 32.)

The succeeding paragraph shows that the distinctive characteristic of Henry's Magnesia, distinguishing it from " ordinary calcined magnesia, used for the same purpose," was that, through successive generations of the same family, for over a century, it has had a peculiar value and reputation " *on account of the* NICETY *with which it is prepared* "—and attributable to nothing else ! (*Ib.*, and fol. 33.)

" Whether it is prepared according to the formula given in the dispensatory, no witness knew." (*Ib.*)

We have already argued (*ante*, pp. 12-14) that, after we had shown this to be the specific thing enumerated, the burden was upon the defendant to sustain his allegation that it was, nevertheless, subject to a higher duty than Congress had affixed to that article.

We now contend that there was evidence to be submitted to the jury which negatived the Collector's proposition; and which made it error for the Court "to direct a verdict for the defendant,

> "upon the ground that *plaintiff had failed to show* that his merchandise, viz. Henry's Calcined Magnesia, is *not* a proprietary medicine," etc. (Rec., 11, bottom.)

Here are *two* errors;—

First, in imposing the burden upon the plaintiff of negativing a proposition affirmed by the defendant as ground for not dutying goods according to the specific enumeration confessedly belonging to them; and,

Second, in not submitting the evidence in the case, upon the point, to the jury, with appropriate instructions.

Even aside from the evidence mentioned, the Court should judicially notice the facts as to an article so long and so well known, medicinally.

> "Courts will take notice of whatever is generally known within the limits of their jurisdiction; and, if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper. *This extends to such matters of science as are involved in the cases brought before him.* See 1 Green. Ev., 11; Gres. Ev., 294; and Taylor's Ev., § 4 and *seq.*"
>
> Brown v. Piper, 91 U. S., 42-3, and citations.
> State v. Wagner, 61 Me., 178, mid.

The Court will not only notice (as proved) that Henry's Magnesia is recommended for its superior *purity* in the standard pharmacopœias, etc., but that *the medical profession does not so recommend*, nor even notice, *any proprietary medicine*.

In addition to the old dispensatories and pharmacopœias, we quote from a late medical work of highest reputation :—

> "The best varieties of the heavy magnesia in commerce are the English ponderous magnesia, sold in bulk, and Henry's, Husband's and Ellis', sold in bottles.
>
> The *ponderous* is now very much used in this country; it has the advantage of smallness of bulk, but lacks the extreme softness of the bottled article. *Henry's* leaves nothing to desire; it is very heavy, soft, and smooth, and is highly esteemed among the more wealthy classes; its price, which is *enhanced by the payment of duty*, almost puts it out of the reach of the middle and poorer classes."
>
> Parrish's Pharmacy, (5 ed., A. D., 1884), 287.

That is to say, by the forced construction which adds fifty per cent., not only to the cost of manufacture but to every expense of bottling, putting up, marketing and importing, an article of prime necessity in medicine, peculiarly valuable for its purity, is put out of the reach of the great body of the people, who must use the inferior and adulterated (or not purified) article!

Did Congress *intend* this when it specifically dutied *all* "magnesia, calcined" at twelve cents a pound?

Are *purity* and care,—"*nicety*,"—the proprietary right of any individual?

EDWIN B. SMITH,
Of counsel for plaintiff.

117-482

Office Supreme Court U.S.
FILED
MAR 22 1886
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

October Term, 1885.

Walton Ferguson
vs.
Chester A. Arthur, late Collector, &c.
No. 190.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for the Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1885.

WALTON FERGUSON
vs.
CHESTER A. ARTHUR, late Collector, &c.
No. 190.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for the Defendant in Error.

This action, brought originally in the supreme court of the State of New York and thence removed into the circuit court of the United States for the southern district of New York (R., pp. 2, 3), is to recover an alleged illegal excess of duty exacted by the defendant in error, then collector for the port of New York, on a certain importation of calcined magnesia (R., p. 3).

The case went to trial on the general issue, *non assumpsit* (R., p. 5).

The jury by direction of the court rendered a verdict for the defendant (R., pp. 6, 7), to which action of the court the plaintiff excepted (R., pp. 7–12).

THE BILL OF EXCEPTIONS.

According to the case presented in the bill of exceptions, the plaintiff imported by the steamer Java, in January, 1876, 522 cases of calcined magnesia, which he contended was dutiable at 12 cents per pound, under Schedule M, Section 2504 Rev. Stat. (p. 477), which provides, *inter alia*, "Magnesia carbonate, six cents per pound; calcined, twelve cents per pound;" but the collector ruled that the merchandise was dutiable at 50 per cent. *ad valorem*, as proprietary medicine, under the following clause of the same schedule (R. S., p. 480):

> Proprietary medicines: Pills, powders, tinctures, troches or lozenges, sirups, cordials, bitters, anodynes, tonics, plasters, liniments, salves, ointments, pastes, drops, waters, essences, spirits, oils, or other

> **medicinal preparations or compositions, recommended to the public as proprietary medicines, or prepared according to some private formula or secret art as remedies or specifics for any disease or diseases or affections whatever affecting the human or animal body: fifty per centum ad valorem.**

This ruling was, on appeal, sustained by the Secretary of the Treasury, and hence this suit.

The merchandise imported was "Henry's Calcined Magnesia," manufactured by Thomas and William Henry, of Manchester, England. It was put up in ounce bottles with the name of the contents and the manufacturers blown in the glass.

Accompanying each bottle were cautions to the public against counterfeit imitations, and an announcement that the words "Henry's Calcined Magnesia" were a trade-mark.

There also went along with each bottle quite an elaborate circular (R., pp. 9–11) which set forth the virtues of calcined magnesia, generally, as a medicine, and then said:

> **"In consequence of improvements which they have made in the manufacture of calcined magne-**

sia, Messrs. Henry are enabled to offer to the public their preparation of this medicine, which has already been honored with the approbation of some of the first chemists and physicians of the age, with increased confidence in its superior quality. The calcined magnesia prepared by them will be found to be perfectly deprived of carbonic acid, free from taste, smell, or other disagreeable property, and without roughness or grittiness to the touch or the palate."

In addition to the above, the plaintiff offered evidence to show that—

> Henry's calcined magnesia is universally known by that name, *and has a character of its own, distinct from ordinary calcined magnesia, though it is used for the same purposes.* It has been prepared by the same family, a firm of manufacturing chemists in Manchester, England, for the last one hundred years, and *has a peculiar value in the market.* It sells in this country at wholesale by the dozen, ounce bottles, for $8.50 and for twenty-seven shillings in England, whereas Husband's preparation, the American preparation of the highest repute, sells at $3 or $3.50 per dozen. Henry's preparation has *a peculiar reputation on account of the nicety with which it is prepared.* Whether it is prepared according to the formula given in the dispensatory no witness knew. There was no dispute upon the above facts in regard to the history of Henry's

> **magnesia *and its peculiar value and reputation*, and the form and style and representations under which it has been and is presented to the public (R., p. 11).**

It also appears that on the British revenue stamps pasted on the cork of each bottle were engraved the names of the manufacturers, William and Thomas Henry. The American "druggists and storekeepers" were informed by the circular accompanying each bottle that Messrs. I. & S. Ferguson, merchants of New York, were the "sole wholesale druggists authorized by Messrs. Henry in the United States, and the article may be constantly had of them genuine and on the best terms."

The circular accompanying each bottle also contains the names of the concerns in London of whom the medicine can be bought at wholesale.

In addition to all this, each bottle of the importation in question bore, at the time of entry, a United States internal-revenue stamp of the denomination "Proprietary."

ARGUMENT.

First point.

Undoubtedly calcined magnesia is an article known to commerce, and is largely the same thing in property and effects, by whomsoever made.

But that it, in common with almost everything else, may become *distinctive*, is conclusively shown by this case.

If Henry's Calcined Magnesia is precisely the same as all other preparations of that kind, it is unaccountable that so particular pains should be taken to prevent the counterfeiting of it. What do the trade-mark and other precautions used by the Messieurs Henry for the purpose of preventing anybody else from selling Calcined Magnesia under the name and description which mark their preparation—what do these things import if it is not that there is something in the mode of calcination used by the Henrys that is superior to every other mode, and that they have appropriated to themselves as their special property that mystery?

It is admitted that the magnesia in question is a *medicinal preparation* and that it is recommended to the public as a remedy for various diseases or affections of the human body, but upon what principle can it be denied to be *proprietary*, also? Was it not necessarily admitted to be proprietary when the plaintiff, as the bill of exceptions states (R., p. 11), offered evidence to show that Henry's magnesia "*has a character of its own, distinct from ordinary calcined magnesia, though it is used for the same purposes;*" that it has a peculiar reputation *on account of the nicety with which it is prepared?*

The use of the trade-mark, alone, is conclusive that the Henrys regarded their preparation of magnesia as a proprietary medicine.

It follows, then, that the importation was not dutiable as calcined magnesia, but as a proprietary medicine.

Upon the same principle it has been ruled by the Secretary of the Treasury that cigarettes claimed to have a medicinal property are not dutiable as cigarettes, but as proprietary medicine. A like ruling was made in the case of

"Johann Hoff's Malt Extract," in bottles and casks, recommended as a medicine, though claimed to be beer. (*Vide* Williams's Tariff LL., 1883.)

Now, if the reasoning used to support this writ of error is valid, those rulings, as sound as they appear, are not maintainable.

The statute says, "*medicinal preparations* or compositions recommended to the public as proprietary medicines." Any "medicinal preparation," be it observed; it need not be composite, it may be simple. And yet the learned counsel for the plaintiff in error contends that to bring a proprietary medicine within this law, there must be an ownership in the medicinal agency itself, and not merely in the manner of the preparation.

Surely Henry's Calcined Magnesia is a "*medicinal preparation.*" What is it, if it is not? Surely it is recommended to the public as a *proprietary medicine;* in a word, it is recommended as a medicine in the mystery of whose preparation the manufacturers are the proprietors.

If a "medicinal preparation" is recommended to the public as a proprietary medicine, *such rec-*

ommendation alone renders it dutiable at 50 per cent.

If the foreign manufacturers of a medicine hold it out to the world as proprietary, *that mere fact* requires it to be entered as such when brought into this country; and in so ordering, and in levying the high tax of 50 per cent. *ad valorem*, no doubt Congress had in view the protection of domestic health rather than domestic industry by virtually excluding many and discouraging the sale of all foreign nostrums. This can be effectively done only by treating and taxing as proprietary all medicinal *preparations* that are held out as such.

The learned counsel opposite says that the medicine in question is not within the proprietary medicine clause of the tariff because it is a simple substance, whereas the law contemplates composite substances. As we have said, already, the law applies to a *mere preparation*, whatever it may be. Surely the term *preparation* does not admit of so restricted a sense as it is sought to place on it. Chalk is a simple substance, and yet when reduced by a very fine pulverization it is called *prepared chalk*, and would, if recommended as a proprietary medicine, be dutiable as such, and not as chalk.

But we have in this case, the manufacturers' own practical construction of the tariff, in the simple fact that each bottle of their preparation of magnesia bears affixed to it a United States internal-revenue PROPIETARY stamp; and it will not be denied that if the preparation is a proprietary medicine under the internal-revenue law, it must be the same under the tariff Indeed, this would seem to be admitted by the effort of the learned counsel to disembarrass his case of the admission involved in the fact that a proprietary stamp was affixed to each bottle of the preparation at the time of importation.

We are left to *infer*, from what is said in the brief (Bf., p. 26), that the internal-revenue proprietary stamp is no longer required to be affixed to Henry's Calcined Magnesia. But if the Commissioner of Internal Revenue had made any such ruling it is not probable we should have been left to find it out by inference and implication !

Second point.

There was no error in directing the jury to find for the defendant.

Says Mr. Justice Gray, as the organ of the Court, in Randall *v.* B. & O. R. R. Co. (109 U. S., 478): "It is the settled law of this Court that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, *the Court is not bound to submit the case* to the jury, but may direct a verdict for the defendant." This position the learned judge sustains by references to decisions of this Court.

Upon the undisputed fact of the plantiff's own case it was clear that he could not recover.

There was nothing for the jury. Every fact and every just inference of fact *were necessarily admitted by the court*, and the direction of the court was *upon the law* as arising from the array of facts conceded. Whether the medicinal preparation